



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CIVIL CASE NO. 103 OF 2015

MICHAEL KIRUNDI KIMANI PLAINTIFF

-VERSUS-

ALEX NYAGA KIRUNDI 1ST DEFENDANT

**STEPHEN NDIRANGU KIRUNDI 2ND
DEFENDANT**

JUDGMENT

1. By a plaint dated **27th March, 2015** the plaintiff, **Michael Kirundi Kimani**, brought the suit herein seeking to permanently restrain the defendants, who are his sons, from interfering with his enjoyment of the parcels of land known as **Loc. 11. Maragi/8032, 8034, 8036, 8040, 8042, 8043, 8044, 8045, 3083** and **3087** (hereinafter referred to as the suit properties). The plaintiff also seeks to restrain the defendants from interfering with his right to dispose of the suit properties and to evict the second defendant from Loc. 11/Maragi/3083, which is one of the suit properties.
2. The plaintiff who is the registered proprietor of the suit properties, claims that the defendants have unlawfully interfered with his right to quietly enjoy the suit properties and in particular his right to dispose off the suit properties.
3. Explaining that he has transferred two parcels of his land to the defendants, the plaintiff contends that the defendants have no legal or equitable right to interfere with his enjoyment of the suit properties.
4. The plaintiff further complains that the second defendant, who is an adult, unlawfully lives in his matrimonial home situated on Loc. 11/Maragi/3083.
5. For the foregoing reasons, the plaintiff prays for eviction orders against the second defendant from the said property.
6. Despite having been served with summons to enter appearance, the defendants failed to enter appearance and file defence within the time stipulated in law and at all. Consequently, the plaintiff applied for and obtained interlocutory judgment against them.
7. When the matter came up for hearing (formal proof), the plaintiff reiterated his case herein above and produced official search certificates showing that he is the registered proprietor of the suit properties.
8. He also informed the court that efforts to resolve the dispute at family level have been in vain. To

prove that there have been attempts to resolve the dispute at family level he produced minutes of a family meeting held on 14th march, 2015 as **Pexbt 2**.

9. He urged the court to grant him the orders sought.

Analysis and determination

(a) Entry of interlocutory judgment:

10. As pointed out herein above, the defendants allegedly failed to enter appearance within the time stipulated in law, causing the plaintiff to apply for interlocutory judgment, which was entered by the deputy registrar of this court on 13th May, 2015.

11. The subject matter of the suit herein being land, the question which arises is whether given the fact that the plaintiff's claim is not a liquidated one, the entry of interlocutory judgment in favour of the plaintiff had any basis in law. Concerning this question, it is noteworthy that the law contemplates that interlocutory judgment could only be entered in respect of the liquidated claim only. In this regard see **Order 10 Rule 2** of the Civil Procedure rules which provides as follows:-

“Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the date fixed in the summons or all the defendants fail to so appear, the court shall, on request of in Form 13 of the Appendix A enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of judgment, and costs.”

12. Liquidated demand was explained in the case of **Serraco Limited v. Attorney General (2009) eKLR** thus:-

“JOWITT’S Dictionary of English law, second Edition volume 2, L-Z. At page 1105 there is found definition for a liquidated demand which is defined as:-

“Liquidated demand where an action is brought for a debt or liquidated demand only, the writ must be endorsed with a statement of the amount claimed and for costs and also with a statement that further proceedings will be stayed if within time limited for appearing, the defendants pays the amount claimed to the plaintiff, his solicitor or agent or into court.

Liquidated on the other hand is defined as: “a sum is said to be liquidated when it is fixed or ascertained. The term is usually employed with reference to damages.” Whereas liquidated damages is defined as:- “ The amount agreed upon by a party to a contract to be paid as compensation for the breach of it and intended to be recovered whether the actual damages sustained by the breach are more or less in contrary distinction to a penalty.”

13. The plaintiff's case being for a perpetual injunction and recovery of land does not, in my view, fall under the claims for which interlocutory judgment could have been entered in favour of the plaintiff under **Order 10 Rule 2**.

14. The plaintiff ought to have proceeded under **Order 10 Rule 9** which provides as follows:-

“Subject to rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing.”

15. In my view it is in the proceedings contemplated under **Order 10 Rule 9** where the plaintiff would prove service of summons and failure to enter appearance as contemplated in law, if the trial court is satisfied that service was effected as by law required it would proceed and hear the plaintiff's case for purposes of determining whether the plaintiff has made up a case of being granted the orders sought.

16. In this case owing to the existence of the interlocutory judgment herein, the trial court did not get an opportunity to interrogate the service allegedly effected on the defendant. Be that as it may, having interrogated the affidavit of service of the process server, **Boniface Ng'ang'a Ng'aara** and the court record which shows that the defendants filed a memorandum of appearance, I have no doubt that the defendants were served with summons to enter appearance and failed to file their statement of defence within the time stipulated by law and at all.

17. Has the plaintiff made up a case for being granted the orders sought?

18. With regard to this question, from the evidence adduced by the plaintiff in support of his claim, I entertain no doubt that he is the registered proprietor of the suit properties. In this regard see certificates of official search which the plaintiff produced as **Pexbt1**.

19. By dint of the provisions of **Section 24** of the Land Registration Act, No.3 of 2012 as the registered proprietor of the suit properties, the plaintiff is entitled to all the rights conferred on a registered proprietor of land by law.

1. Section 24 provides:-

“ (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant ; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”

20. Under **Section 25** of the Act, the rights conferred on a registered proprietor of land cannot be defeated except as provided in the Act.

21. The said provisions of the law confers on a registered proprietor of land the right to hold land in respect of which he is the registered proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.

22. The rights of a registered proprietor of land are, however, subject to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and (b) to such liabilities, rights and interests as affect the same and are declared by **Section 28** not to require noting on the register, unless the contrary is expressed in the register.

23. **Section 26 (1)** there under, imposes an obligation on this court to take a certificate of title issued by the Registrar upon registration, as *prima facie* evidence that the person named as proprietor of the land is the absolute and inde feisible owner of the land.

24. In the circumstances of this case, there being no evidence that the title held by the plaintiff is subject to any of the limitations contemplated in law, I find and hold that the plaintiff has made up a case for being granted the orders sought. Consequently, I allow the claim herein as prayed.

Dated, signed and delivered at Nyeri this 13th day of October, 2016.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Mwangi h/b for Mr. Njoroge for the plaintiff

N/A for the defendantss

Court assistant - Lydia